Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

In the Supreme Court of the United States

October Term, 1994

ROBERT V. O'CONNOR,

Petitioner,

v.

REHABILITATION SUPPORT SERVICES, INC., and JOHN F. HUDACS, AS COMMISSIONER OF LABOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

DAVID E. O'CONNOR
1 Avalon Place
Weathersfield, Connecticut 06109
(203) 278-8843

March 20, 1995

QUESTION PRESENTED

The Petitioner contacted a newspaper reporter in knowing violation of a company policy against contacting the media without prior management approval. He was discharged for this violation and denied unemployment compensation benefits. There was no other finding of wrongdoing on the part of the Petitioner. The question presented is:

Whether the denial of Petitioner's unemployment benefits violates the Free Speech clause of the First Amendment.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

The Petitioner, Robert V. O'Connor, respectfully prays that a writ of certiorari issue to review the disimissal by the Court of Appeals for the State of New York, entered in the above proceeding on December 22, 1994.

OPINIONS BELOW

The opinion of the Supreme Court, Appellate Division for the State of New York (App. 2) and the dismissal by the Court of Appeals for the State of New York (App.1) are unreported.

JURISDICTION

Date of decision sought to be reviewed: December 22, 1994.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution states in full: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances. [1791]

STATEMENT OF THE CASE

Rehabilitation Support Services ("RSS"), the Petitioner Robert V. O'Connor's former employer, is a non-profit mental health care provider. RSS contracts with the State of New York to service ten counties in that state. In the year directly preceding Mr. O'Connor's dismissal, three RSS patients had been murdered by their roommates at RSS facilities. Three New York agencies investigated the murders (the New York State Office of Mental Health, the Commission on Quality Care, and the Albany Police Department). The agencies found RSS not responsible for the murders. However, several employees at RSS felt the unfortunate events could be indirectly linked to the administrator's poor management. The employees believed that the director's salary and perks were excessive. The employees, the people who had the most direct, daily contact with RSS patients, received modest incomes ranging from mid to high teens. The employees felt that the lack of appropriate salary and the general poor treatment of the staff resulted in high staff turnover that was detrimental to the recovery and continued treatment of the patients. They felt these factors contributed to the general

dysfunction of RSS.

Mr. O'Connor took action by writing to the Attorney General of New York and sent a copy of that letter to Michael Gormley, a reporter with the *Albany Times Union*. Mr. O'Connor's letter set forth the contentions described above. Mr. Gormley reported on the employee dispute in a signed article on August 18, 1991.

Mr. O'Connor had accidentally left the second page of this letter on a photocopier of RSS. It was discovered by management. As a result, Mr. O'Connor was fired. Mr. O'Connor's action violated a RSS policy which required that any comment about the company made by an employee to the media receive clearance from personnel management. He had been an employee of RSS for one year and five months before his dismissal. His performance reviews had been favorable.

The State of New York denied Mr. O'Connor unemployment benefits after his dismissal. The Administrative Law Judge for the New York State Department of Labor, Unemployment Insurance Division stated that Mr. O'Connor was ineligible for unemployment benefits based on the finding of fact that Mr. O'Connor was aware of the RSS policy regarding media statements and knowingly violated it. (App. 6).

In his memorandum to the Administrative Law Judge, Mr. O'Connor contended that he should not be denied unemployment benefits for contacting the press.

The determination the Department of Labor was appealed to the Unemployment Insurance Appeal Board. The Appeal Board affirmed the Administrative Law Judge's decision. The opinion stated that the decision was supported by the record. (App. 4).

The Petitioner appealed to the New York Supreme Court, Appellate Division. The Appellate Division affirmed the Board's decision, stating that Petitioner unjustifiably

violated a reasonable RSS policy. (App. 2). Petitioner argued in his brief that the state could not deny him unemployment benefits where he had been fired for exercising his right to free speech. In an apparent response to this argument, the Appellate Division stated that "Claimant's remaining contentions on this appeal have been considered and rejected for lack of merit." (App. 2).

The Petitioner then appealed to the New York Court of Appeals (App. 1). The court dissmissed the appeal without considering the argument that, when a company policy restricts First Amendment rights and uses this as a basis on which to fire an employee, the state cannot then refuse unemployment benefits.

REASON FOR GRANTING THE PETITION

The Petitioner's case presents this Court with the opportunity to expand to free speech the holding that states may not deny unemployment benefits to individuals who have exercised their First Amendment rights when the employee's dismissal was a result of religious beliefs.

The denial of unemployment benefits to the Petitioner in this case may have a chilling effect on employees who choose to contact investigatory authorities and/or reporters who may bring to the light of public scrutiny misdeeds of employers. By granting the Petitioner rights to benefits, a clear legal standard will be set for states to follow. We respectfully submit that this Court should grant review to determine whether a state may place such a burden on the free-speech rights granted in the First Amendment.

As the cases below clearly indicate, this Court has set out a standard whereby those individuals who have been fired for their sincere religious beliefs cannot be denied unemployment benefits. New York State has failed to consider that these cases could apply to individuals fired for contacting the news media in a sincere attempt to help

individuals at risk (mentally disabled patients in the present case).

The following cases all held that claimant's who were fired for acting on sincerely held religious beliefs could not be denied unemployment benefits: *Sherbert v. Verner*, 374 U.S. 398 (1963), *Thomas v. Review Board of the Indiana Employment Security Division et al.*, 450 U.S. 707 (1981), *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136 (1987), and *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989). Justice White summed up the reasoning of these cases in *Frazee*: "[i]n each of these cases, the appellant was 'forced to choose between fidelity to religious belief and...employment'...and we found 'the forfeiture of unemployment benefits for choosing the former over the latter brings unlawful coercion to bear on the employee's choice (quoting *Hobbie*, 480 U.S. at 144).' " 489 U.S. at 831. Limitations on this rule were set by this Court in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) (actions based on religious beliefs must be legal). Similar limitations can be extended to cases that would cover the present fact pattern. Where a claimant attempts to contact the media and uses speech that is properly objectionable, the employee can be fired—and unemployment benefits rightfully denied—on those grounds and not, as with the Petitioner here, purely on the grounds of having violated company policy by contacting the media without permission. For example, in *Messina v. Iowa Dept. of Job Services*, 341 N.W. 2d 52 (1983), an employee wrote a letter to the editor calling for a wildcat strike. Calling for a wildcat strike was in direct violation of a union-management agreement. He was fired for misconduct and denied benefits. The denial was upheld by the Iowa Supreme Court, with the court properly placing its emphasis on the substance of the employee's actions: "[t]he employee's right to publicly criticize or condemn his

employer or his union is not implicated by this decision. Only his activity in calling for a wildcat strike in violation of the agreement...." *Id.* at 63.

CONCLUSION

New York has not submitted any compelling or rational reason for the denial of unemployment benefits to the Petitioner. The petition for a writ of certiorari should be granted.

Respectfully submitted.

_____

David E. O'Connor

APPENDIX

State of New York
Court of Appeals

Donald M. Theraw
Clerk of the Court
Clerks Office
Albany, New York 12207

DECISION December 22, 1994

Mo. No. 1518 SSD 96

In the Matter of the Claim of
ROBERT V. O'CONNOR,
Appellant.

REHABILITATION SUPPORT
SERVICES, INC.,
Respondent.
JOHN F. HUDACS, as
Commissioner of Labor,
Respondent.

Appeal dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

SUPREME COURT - APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

Decided and Entered: September 22, 1994
69942

In the Matter of the Claim of
ROBERT V. O'CONNOR,
Appellant.

REHABILITATION SUPPORT
SERVICES, INC.,
Respondent.
JOHN F. HUDACS, as
Commissioner of Labor,
Respondent.

MEMORANDUM AND ORDER

Calendar Date: September 7, 1994
Before: Cardona, P.J., Mikoll, Mercure, White and Yesawich Jr., JJ.

Robert V. O'Connor, Pittsfield, Massachusetts, appellant in person.

Michael T. Wallender, Albany, for Rehabilitation Support Services Inc., respondent.

Appeal from a decision of the Unemployment Insurance Appeal Board, filed June 23, 1993, which ruled that claimant was disqualified from receiving

unemployment insurance benefits because his employment was terminated due to misconduct.

The Board found that claimant, a psychiatric rehabilitation specialist, knowingly violated the employer's policy prohibiting the release of employer-related information to the media without authorization. The Board also found that the policy was reasonable and that claimant's knowing violation was not justified. Accordingly, the Board ruled that claimant's actions constituted misconduct disqualifying him from receiving unemployment insurance benefits. Insofar as the Board's decision is supported by substantial evidence, it must be upheld. Claimant's remaining contentions on this appeal have been considered and rejected for lack of merit.

Cardona, P.J., Mikoll, Mercure, White and Yesawich Jr., JJ. concur.

ORDERED that the decision is affirmed, without costs.

ENTER:
Michael J. Novack
Clerk of the Court

STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD
One Main Street, Brooklyn, NY 11201
(718) 797-7156

In the Matter of : Robert V. O'Connor, 31 Chickering Street, Pittsfield MA 01201-0000

DEPARTMENT OF LABOR OFFICE: 001

Rehabilitation Support SVC
James E. Marco, 306 Central Avenue, Albany NY 12206-0000

Rehabilitation Support 523 Western Avenue, Albany, NY 12203.

A.S.O. - Appeals Section
[Notice of time to appeal in English and Spanish]

DECISION OF THE BOARD:
PRESENT: Sam Kovenetsky, Ronald J. Segedy
MEMBERS

By initial determination of the local office, the claimant as disqualified from receiving benefits because of a loss of employment through misconduct in connection therewith effective June 17, 1993. The claimant requested a hearing.

The Administrative Law Judge held a hearing at

which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances on behalf of the claimant and of the employer. By decision dated September 4, 1991 the Administrative Law Judge sustained the initial determination.

The claimant appealed the judge's decision to the Board.

We have reviewed the entire record and have considered the testimony and evidence. The findings of fact and the opinion of the Administrative Law Judge are fully supported by the record. It appears that no errors of fact or law have been made. We, therefore, adopt the findings of fact and the opinion of the Administrative Law Judge as the findings of fact and the opinion of the Board.

DECISION: The initial determination of the local office is sustained. The decision of the Administrative Law Judge is affirmed.

Sam Kovenetsky, MEMBER

RF:CM

Ronald J. Segedy, MEMBER

DECISION MAILED AND DULY FILED ON THE DEPARTMENT OF LABOR ON : SEPTEMBER 4, 1991.

CASE: 191-05637

SSA: 024-44-7750

REQUEST DATE: July 12, 1991

New York State Department of Labor Local Insurance Office # 001

PARTIES PRESENT: CLAIMANT, EMPLOYER.

PURPOSE OF HEARING: To determine Claimant's loss of employment through misconduct.

FINDINGS OF FACT: Claimant was employed as a psychiatric rehabilitation specialist for a social services agency for approximately one year and five months, until May 17, 1991.

Claimant and some other employees were concerned with how the program was going and felt that too much was being spent on administrators' salaries and perks, and that this impacted on care to the clients and salaries of other employees such as claimant.

Claimant was aware of employer's policies that employees were not to give statements concerning the agency to the media unless authorized by agency management personnel. Despite this, claimant prepared a letter to a law enforcement agency critical of the

employing agency and sent a copy to a reporter at a local newspaper. A copy of the second page of the two-page letter indicating a copy to the reporter was found in the agency's copy machine. That page talked about three clients having been killed by their roommates in the last year, and suggested that high staff trun over due to job dissatisfaction and low client-staff ratio were problems.

Claimant was confronted with the second page of said letter by his supervisors and was asked in regard to the firs page, but declined to provide any information regarding its contents or to whom addressed. Claimant was suspended, then discharged for violation of company policy.

There had been discussions between claimant and the other employees and management about some of their perceived grievances and concerns. Claimant contends that he was justified in sending the letter to a reporter and protected, in so doing, by the New York State "Whistleblower's statute." Several health service agencies had investigated the deaths of the thee clients and not attributed fault to the employer. Claimant was especially concerned about his low salary.

OPINION: The credible evidence indicates that the claimant knowingly violated a reasonable policy of the employer, not to release agency-related information to the media without authorization. Claimant contends that he was a "whistleblower,' and this, his actions were justified. On the record herein, I conclude that claimant's knowing

violation of employer's policy was not so justified. Accordingly, his actions constituted misconduct under the Unemployment Insurance Law.

DECISION: The initial determination is sustained.

das/s/ ROBERT GAFFIGAN

Administrative Law Judge

New York State Department of Labor
Unemployment Insurance Division

Notice of Determination to Claimant

Robert O'Connor, 169 Elk Street #1, Albany, New York 12210

No unemployment insurance benefits can be paid to you for the period beginning 5/18/91 until you have subsequently worked for an employer not less than 3 days in each of 5 weeks and earned at least 5 times your weekly benefit rate. Self-employment and earnings from self-employment will not count.

DETERMINATION: You lost your employment through misconduct in connection with your last employment.

REASON: This determination is based on the following: You violated your company's policy regarding media statements. You were aware of this policy. Though you felt you were justified your actions were detrimental to your employer. Violation of a company's policy or employer's policy of which you were aware is considered misconduct within the meaning of the unemployment insurance law.